

APPEAL NO. 051011
FILED JUNE 13, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 6, 2005. The hearing officer resolved the disputed issues by deciding that the compensable injury of _____, does not extend to or include an injury to the lumbar spine diagnosed as L4-5 radiculopathy and L5-S1 herniated disc; that the respondent (carrier) has not waived the right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022; and that the appellant (claimant) had disability due to the injury sustained on _____, from _____, up to October 10, 2002. The claimant appealed, disputing the waiver, extent-of-injury and disability determinations. The carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant contended that he injured his back when he straightened after pouring out the contents of a five gallon container. The claimant underwent a magnetic resonance imaging (MRI) on September 26, 2002, which found a small central right paracentral disc herniation at L5-S1 and decreased signal intensity on the T2 weighted images from the L4-5 and L5-S1 discs. The claimant acknowledged that he sustained a prior work related back injury in 1992, which subsequently resulted in surgery, while working for a different employer.

EXTENT OF INJURY AND DISABILITY

The claimant had the burden of proof on the disputed issues of extent of injury and disability. Conflicting evidence was presented on these disputed issues. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determinations on the extent-of-injury and disability issues are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

WAIVER

The waiver issue determined at the CCH was worded as follows: "Has the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022?" The waiver issue was not limited by the inclusion of the conditions alleged in the extent-of-injury

issue. In both its closing argument and its written response to the claimant's request for review, the carrier acknowledges that it received written notice of the claimed injury on August 26, 2002, and began to pay temporary income benefits on September 4, 2002, 9 days later. The hearing officer specifically found that the carrier did not dispute any portion of the claimed injury within 60 days of its first written notice. This finding was not appealed.

Section 409.021 provides, in pertinent part, that for injuries occurring prior to September 1, 2003, an insurance carrier shall, not later than the 7th day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission (Commission) and the employee in writing of its refusal to pay benefits. It is undisputed that the carrier failed to do this. Therefore, the hearing officer's determination that the carrier has not waived the right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022 is incorrect as a matter of law. We reverse the determination that the carrier did not waive the right to contest compensability of the claimed injury and render a new determination that the carrier has waived the right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

The question then becomes what is the injury the carrier has waived and as noted in prior cases the injury waived is not necessarily what the carrier says it accepted in its Payment of Compensation of Notice of Refused/Disputed Claim (TWCC-21). See Texas Workers' Compensation Commission Appeal No. 042168, decided October 18, 2004. Texas Workers' Compensation Commission Appeal No. 041738-s, decided September 8, 2004, established that when a carrier does not timely dispute the compensability of a claim, the compensable injury is defined by the information that could have reasonably been discovered by the carrier's investigation prior to the expiration of the waiver period, which in this case would be 7 days pursuant to Section 409.021. In the instant case, the carrier would have had no way to discover that the claimant had a herniated disc at L5-S1 or L4-5 radiculopathy within 7 days of its written notice of the claimed injury. The hearing officer specifically found that the carrier had no knowledge of the claimed L4-5 radiculopathy or the claimed L5-S1 injuries within 7 days of its first written notice. There is sufficient evidence to support this finding. As previously noted, the MRI in evidence which reflects the L5-S1 herniation and problems with L4-5 area of the lumbar spine was performed on September 26, 2002, more than 7 days after the carrier first received written notice.

We reverse the hearing officer's decision that the carrier has not waived the right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022 and render a decision that the carrier has waived the right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022. We affirm the extent-of-injury and disability determinations. The carrier did not waive the right to dispute the extent of injury regarding L4-5 radiculopathy and the L5-S1 herniated disc.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701-3403.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge